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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 18, 2004

Case No.: TIA-0114

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for her late husband, XXXXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a truck operator and the captain of the fire guard security at the DOE's Oak Ridge site (the site) for approximately twenty-six years, from 1974 to 2000.

The Applicant filed a claim with the OWA, requesting physician panel review of claims of two illnesses: brain cancer and pulmonary fibrosis. The Applicant asserted that the Worker's illnesses were the result of his work in "hot burial grounds and buildings."²

The Physician Panel rendered negative determinations with regard to both of the illnesses. The Panel examined the Worker's dosimetry readings and his exposure records. It concluded his dosimetry record showed that his total radiation exposure was below the permissible occupational

¹ See Department of Energy, Office of Worker Advocacy, available at www.eh.doe.gov/advocacy.

² Record (Work History for Claim under EEOICPA).

exposure standard.³ In its report, the Panel also considered a mercury spill which was documented in the site medical records. However, it noted that the record lacked documentation of any other exposures. Therefore, the Panel found that there was insufficient evidence to support the conclusion that exposure to toxic chemicals or radiation was a significant factor in causing, contributing or aggravating the brain cancer.

The Panel also reviewed the Applicant's claim of pulmonary fibrosis. Although the Panel acknowledged that the Worker had the condition, the Panel concluded that there was insufficient evidence to show that the pulmonary fibrosis was related to any toxic exposures at the site. The Panel considered it more likely instead that the disease was associated with the Worker's chemotherapy medication and history of smoking.

The OWA accepted the Physician Panel's negative determinations, and the Applicant filed the instant appeal.

In her appeal, the Applicant maintains that the Panel's negative determination is incorrect. The Applicant contends that the Worker was "required to enter and inspect numerous buildings containing radioactive substances, toxins, both light and heavy metals, airborne particulates, and noxious odors and fumes on a regular basis."⁴ The Applicant further asserts that exposure to these substances are known causes of brain cancer and pulmonary fibrosis.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant's appeal alleges exposure to substances not identified in the original application. Because these are new assertions, the Panel did not have a chance to consider them and, therefore, they do not indicate Panel error. If

³ Panel Report at 1.

⁴ Applicant's Appeal Letter, dated June 16, 2004.

the Applicant wishes to have these additional exposures considered, she should raise the issue with the DOL.

As the foregoing indicates, the Physician Panel addressed the Applicant's claims of brain cancer and pulmonary fibrosis, made its determinations, and explained the reasoning for its conclusions. The Applicant's appeal asserts new exposures, but does not indicate error on the part of the Panel. Therefore, the appeal should be denied.

Finally, we note that new information may be available concerning the Worker's level of radiation exposure. The record indicates that, at the time the Panel considered the claim, the National Institute for Occupational Safety and Health (NIOSH) was in the process of performing a dose reconstruction.⁵ This NIOSH dose reconstruction may provide further information that would support the Applicant's Subpart E claim.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0114 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date:

⁵ See Record (Case History).